

Indiana Department of State Revenue

Revenue Ruling #2005-02URT

October 17, 2005

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ISSUES

Utility Receipts Tax – Nexus

Authority: IC 6-2.3-2-1, IC 6-2.3-4-2, IC 6-2.3-1-4

The taxpayer requests the Department to rule whether or not the taxpayer has sufficient nexus with Indiana under any of the following scenarios to be subject to Utility Receipts Tax.

STATEMENT OF FACTS

The taxpayer is a non-resident engaged in the business of marketing natural gas to large industrial consumers and other wholesalers of natural gas located in Indiana. On a national level, about ten percent (10%) of the taxpayer's business is large industrial end-user consumers and the remaining sales are wholesale sales. In Indiana, however, nearly 100% of the taxpayer's sales are to large industrial consumers.

DISCUSSION – ISSUE #1 **FLASH TITLE**

The taxpayer uses the North American Energy Standards Board (the "NAESB") standard buy/sell agreement (the "Contract") as the basis of all of its natural gas sales. Sales under the Contract are typically specified in a confirmation that is determined on a periodic basis and contains specific details such as the amount of gas to be purchased, the price, the delivery details, etc. All the activity in connection with the Contract and confirmations such as the negotiations, acceptance of orders, right of approval or rejection, etc. are executed from the taxpayer's office outside the state of Indiana. The taxpayer does not maintain an office or other place of business in Indiana and does not have employees or agents in Indiana. The taxpayer does not maintain any natural gas inventory in Indiana. The taxpayer communicates with its Indiana customers via telephone or e-mail.

Sales of natural gas to customers in Indiana are back-to-back purchases and sales. A "back-to-back sale" occurs when a gas marketer, such as the taxpayer, purchases gas in the open market

from a third party gas marketer or utility that is on the interstate pipeline at a point within Indiana and then sells the purchased gas at the exact same point to an Indiana consumer. Consequently, the taxpayer has title to the natural gas for a moment in time (flash title) in Indiana, the same moment in time the title is transferred to the ultimate consumer by operation of law. The taxpayer does not transport the gas, as it does not own or have a right to transport on the interstate pipeline associated with these Indiana sales. The consumer, having title, contracts with a local gas distribution company to transport the gas to their facility for consumption.

IC 6-2.3-2-1 states:

Sec. 1. An income tax, known as the utility receipts tax, is imposed upon the receipt of:

1. the entire taxable gross receipts of a taxpayer that is a resident or domiciliary of Indiana, and
2. the taxable gross receipts derived from activities or businesses or any other sources within Indiana by a taxpayer that is not a resident or domiciliary of Indiana.

IC 6-2.3-4-2 states:

Sec. 2. Gross receipts derived from business conducted in commerce between Indiana and either another state or territory or foreign country are exempt from utility receipts tax to the extent the state is prohibited from taxing the gross receipts by the Constitution of the United States.

It is clear then, Utility Receipts Tax is imposed on the taxable gross receipts from sources within Indiana by a taxpayer that is not a resident or domiciliary of Indiana to the extent Indiana is not prohibited from taxing the gross receipts by the United States Constitution.

In this issue, all of the taxpayer's activities giving rise to its income from Indiana occur outside Indiana with the exception of flash title. The Department equates flash title with ownership of natural gas inventory in Indiana. The inventory is sold to Indiana customers. The inventory in Indiana creates substantial nexus for the taxpayer with Indiana under Commerce Clause jurisprudence, therefore, the taxpayer's Indiana receipts are subject to Utility Receipts Tax.

RULING – ISSUE #1

The Department rules flash title of inventory in Indiana creates substantial nexus with Indiana, therefore, the Taxpayer's receipts from Indiana are subject to Utility Receipts Tax.

DISCUSSION – ISSUE #1A **FLASH TITLE AND 2 INCIDENTAL VISITS**

The facts are the same as Issue #1 (flash title) with one addition: as a matter of happenstance, a taxpayer employee may make up to two (2) day trips to Indiana in a four (4) year period. Such

trips would not be regular or systematic visits, but would be isolated and infrequent, although both may occur in one calendar year when no visits had occurred in the preceding three years. The visits do exceed “mere solicitation” and any “ancillary activities”.

Having determined that Issue #1 (flash title) creates substantial nexus for the taxpayer with Indiana, a determination is not required on this issue.

RULING-ISSUE #1A

A ruling is not applicable.

DISCUSSION – ISSUE #1B **FLASH TITLE AND 12 ANNUAL VISITS**

The facts are the same as those in Issue #1 (flash title) with one addition: a taxpayer employee would visit Indiana regularly to meet with two (2) or three (3) customers per visit.

Having determined that Issue # 1 (flash title) creates substantial nexus for the taxpayer with Indiana, a determination is not required on this issue.

RULING-ISSUE #1B

A ruling is not applicable.

DISCUSSION – ISSUE #2 **LOGISTICS SERVICES**

The same facts as Issue #1 except that the taxpayer would have no activities in Indiana because instead of selling gas to Indiana customers that would necessitate the taxpayer having flash title in Indiana, the taxpayer would do nothing other than perform service outside Indiana for the Indiana customers. The taxpayer would be its Indiana customer’s agent in managing a customer’s transportation account with a third-party utility. Under this set of facts, the taxpayer does **not** sell natural gas to Indiana end users, but would solely schedule transportation of the natural gas between buyer and seller from a location outside Indiana. The seller would send an invoice to “the taxpayer as agent on behalf of customer” for the natural gas and the transportation services. The taxpayer, acting in its agency capacity, would pay the entire amount of the invoice. The taxpayer would then invoice its customer for the charges the taxpayer incurred on the customer’s behalf as customer’s agent such as costs related to the cost of the natural gas, the transportation service, and any logistical services the taxpayer provided.

All contracts for the purchase and transportation of the natural gas would be between the Indiana customer and the seller. The taxpayer would schedule the transportation; however, it would **not** take title to or make any purchase of the natural gas. As in Issue #1, the taxpayer would not transport, own, or have a right to transport the natural gas on the interstate pipelines. The taxpayer would receive a fee for services of managing the Indiana customers’ transportation, not for selling natural gas to Indiana customers. All the taxpayer activities related to the scheduling of the transportation would be performed at the taxpayer’s headquarters outside of Indiana. The

taxpayer will have no property in Indiana, and its employees would not enter Indiana to perform any duties.

Finally, in the event that the Indiana customer has excess volumes of natural gas, the taxpayer could also act on the Indiana customer's behalf by providing re-marketing services outside Indiana for an additional fee.

All of the taxpayer's activities giving rise to its income from Indiana occur outside of Indiana. Further, the taxpayer is not receiving consideration for the retail sale of utility services for consumption. IC 6-2.3-1-4. The taxpayer's receipts are from logistics services, therefore, are not subject to Utility Receipts Tax.

RULING –ISSUE #2

The Department rules the taxpayer's Indiana receipts from logistics services are not subject to Utility Receipts Tax.

DISCUSSION-ISSUE #3 **TWO LINES OF BUSINESS, NO TRANSPORTATION**

The facts in Issue #1 (flash title), #1A (2 incidental visits), and then #1B (12 annual visits) are combined each in turn with facts in Issue #2 (logistics services) to give the taxpayer receipts from two distinct lines of business. Moreover, in this fact scenario, the taxpayer does **not** either transport or obtain the right to transport natural gas on the interstate pipelines.

The Department has ruled in Issue #2 the taxpayer's receipts from logistics services are not subject to Utility Receipts Tax because all of the taxpayer's activities giving rise to its income from Indiana occurs outside Indiana and the taxpayer's receipts are not from the retail sale of utility services for consumption.

In the instant case, the taxable rulings of Issues #1, #1A and #1B do not cause the nontaxable ruling of Issue #2 to change.

RULING – ISSUE #3

The Department rules the taxpayer's Indiana receipts from logistics services are not taxable when coupled with Issues #1, #1A and #1B which are taxable.

DISCUSSION – ISSUE #4 **DELIVERY BY TAXPAYER**

The facts are identical to those under Issue #1 (flash title) with the following exceptions:

1. the natural gas is transported by the taxpayer, not a third party utility, to the Indiana customer via common carrier (the interstate pipeline). The taxpayer takes title to the natural gas and also bears the risk of loss during transportation; and

2. the natural gas is purchased outside Indiana by the taxpayer, which eliminates flash title resulting in no natural gas inventory in Indiana.

Here, the taxpayer purchases natural gas outside Indiana and transports the natural gas to its Indiana buyer via common carrier (interstate pipeline). Further, all the taxpayer's activities generating receipts from Indiana customers are performed outside Indiana. Commerce Clause jurisprudence dictates that these receipts are not subject to Utility Receipts Tax.

RULING – ISSUE #4

The Department rules the taxpayer's receipts from the sale of natural gas to Indiana customers, that was purchased outside Indiana and transported by the taxpayer via common carrier to Indiana customers, are not subject to Utility Receipts Tax.

DISCUSSION – ISSUE #5 **TWO LINES OF BUSINESS, TRANSPORTATION**

The facts in Issue #1(flash title), #1A (2 incidental visits), and then #1B (12 annual visits) are combined each in turn with facts in Issue #4 (delivery by taxpayer) to give the taxpayer receipts from two distinct lines of business. Moreover, in this fact scenario, the taxpayer **does** either transport or obtain the right to transport natural gas on the interstate pipelines.

Having determined that Issues #1, #1A and #1B create substantial nexus for the taxpayer with Indiana, any combination of these issues with Issue #4 will create substantial nexus for the taxpayer with Indiana. A determination, therefore, is not required on this issue.

RULING – ISSUE #5

A ruling is not applicable.

CAVEAT

This ruling is issued to the taxpayer requesting it on the assumption that the taxpayer's facts and circumstances, as stated herein are correct. If the facts and circumstances given are not correct, or if they change, then the taxpayer requesting this ruling may not rely on it. However, other taxpayers with substantially identical factual situations may rely on this ruling for informational purposes in preparing returns and making tax decisions. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact situation of the taxpayer is different in any material respect from the facts and circumstances given in this ruling, then the ruling will not afford taxpayer any protection. It should be noted that subsequent to the publication of this ruling, a change in statute, regulation, or case law could void the ruling. If this occurs, the ruling will not afford the taxpayer any protection

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